

which it operates for purposes of the following:

- (1) Receiving and distributing shared savings.
- (2) Repaying shared losses or other monies determined to be owed to CMS.
- (3) Establishing, reporting, and ensuring provider compliance with health care quality criteria, including quality performance standards.
- (4) Fulfilling other ACO functions identified in this part.

(b) An ACO formed by two or more ACO participants, each of which is identified by a unique TIN, must be a legal entity separate from any of its ACO participants.

(c) An ACO formed by a single ACO participant may use its existing legal entity and governing body, provided it satisfies the other requirements in §§ 425.104 and 425.106.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32834, June 9, 2015]

§ 425.106 Shared governance.

(a) *General rule.* (1) An ACO must maintain an identifiable governing body with ultimate authority to execute the functions of an ACO as defined under this part, including but not limited to, the processes defined under § 425.112 to promote evidence-based medicine and patient engagement, to report on quality and cost measures, and to coordinate care.

(2) The governing body of the ACO must satisfy all of the following criteria:

- (i) Be the same as the governing body of the legal entity that is the ACO.
- (ii) Be separate and unique to the ACO and must not be the same as the governing body of any ACO participant, except as provided in § 425.104(c).
- (iii) Satisfy all other requirements of this section.

(b) *Responsibilities of the governing body and its members.* (1) The governing body must have responsibility for oversight and strategic direction of the ACO, holding ACO management accountable for the ACO's activities as described in this part.

(2) The governing body must have a transparent governing process.

(3) The governing body members must have a fiduciary duty to the ACO, including the duty of loyalty, and must

act consistent with that fiduciary duty.

(c) *Composition and control of the governing body.* (1) The ACO must—

(i) Establish a mechanism for shared governance among the ACO participants or combinations of ACO participants (as identified in § 425.102(a)) that formed the ACO; and

(ii) Provide for meaningful participation in the composition and control of the ACO's governing body for ACO participants or their designated representatives.

(2) The ACO governing body must include a Medicare beneficiary who—

- (i) Is served by the ACO;
- (ii) Is not an ACO provider/supplier;
- (iii) Does not have a conflict of interest with the ACO; and
- (iv) Does not have an immediate family member who has a conflict of interest with the ACO.

(3) At least 75 percent control of the ACO's governing body must be held by ACO participants.

(4) The governing body members may serve in a similar or complementary manner for an ACO participant.

(5) In cases in which the composition of the ACO's governing body does not meet the requirements of paragraphs (c)(2) and (c)(3) of this section, the ACO must describe why it seeks to differ from these requirements and how the ACO will involve ACO participants in innovative ways in ACO governance or provide meaningful representation in ACO governance by Medicare beneficiaries.

(d) *Conflict of interest.* The ACO governing body must have a conflict of interest policy that applies to members of the governing body. The conflict of interest policy must—

(1) Require each member of the governing body to disclose relevant financial interests; and

(2) Provide a procedure to determine whether a conflict of interest exists and set forth a process to address any conflicts that arise.

(3) The conflict of interest policy must address remedial action for members of the governing body that fail to comply with the policy.

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